Supreme Court, U.S.
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09-189 JUN 09 2009

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2009

SCOTT HELGERSON

Petitioner,

v.

STATE OF TEXAS,

Respondent

Petition for Writ of *Certiorari* to the Texas Appeals Court

Richard W. Rogers, III
710 Buffalo Street
Suite 202
Corpus Christi, TX 78401
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QUESTION PRESENTED FOR REVIEW

Is the Texas statutory sentencing process that allowed the trial court to cumulate the petitioner's three twenty-year sentences for a single act of criminal misconduct with multiple victims so arbitrary that it violated his United States constitutional right to due process?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the Court of Appeals, Thirteenth District of Texas were Scott Helgerson, Petitioner and Respondent, the State of Texas.

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The petitioner, Scott Helgerson, was convicted on his plea of guilty to three intoxication manslaughter charges stemming from an automobile collision with three fatalities. He was assessed three separate twenty-year sentences by a single jury. Over his due process objection, the trial court judge cumulated the three twenty-year sentences to form one sixty-year sentence.

The Texas Thirteenth Court of Appeals of Texas affirmed his conviction and the sentence cumulation. The Texas Court of Criminal Appeals refused discretionary review on March 11, 2009. The petitioner respectfully prays that a writ of certiorari issue to review these decisions.

OPINION BELOW

The opinion and judgment of the Texas Thirteenth Court of Appeals was not published. It is attached as Appendix 1.

STATEMENT OF JURISIDICTION

The 347th District Court of Texas rendered judgment and sentence on May 7, 2007. This case was appealed and affirmed on August 28, 2008 by the Thirteenth Court of Appeals of Texas. A petition for discretionary review with the Court of Appeals of Texas was timely filed and refused on March 11, 2009. No motion for rehearing was filed.

The decision of the Texas Thirteenth Court of Appeals, with review refused by the Texas Court of Criminal Appeals, decided an important question of federal law in a way that conflicts with relevant decisions of the United States Supreme Court. The petitioner seeks review of a judgment by the highest state court in which a decision could be had and invokes this Court's jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...."

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted for three counts of intoxication manslaughter, one count of intoxication assault, and aggravated assault on February 1, 2007.

The five offenses were alleged to have occurred as the result of a December 30, 2006 two-car automobile collision in Nueces County, Texas.

Petitioner pled guilty to the three intoxication manslaughter counts and the aggravated assault count on May 3, 2007. (The intoxication assault charge, involving the same victim as the aggravated assault, was dismissed.) Petitioner admitted that he was intoxicated while driving a motor vehicle and that his conduct had caused the accident.

At petitioner's election, a jury was empanelled to assess punishment. The jury heard evidence as to the accident and the three deaths and one injury, as well as evidence about petitioner's past and future prospects. They rendered a verdict on May 4, 2007. Petitioner was assessed the maximum twenty-year sentence and $10,000 fine on each count. Over petitioner's due process objection, the trial court judge ordered the sentencing on the three intoxication manslaughter cases to run consecutively (the sentence in the aggravated assault was made concurrent with the resulting sixty-year sentence as required by law). The trial court further found petitioner used a deadly weapon during the commission of the offenses. Petitioner appealed, claiming in part, the due process violation. The trial court's judgment was affirmed by the Texas courts.

Texas has a unique sentencing scheme to punish intoxicated drivers who kill or maim. Texas Penal Code 3.03(a) provides that punishments for multiple offenses arising out of the same criminal episode and prosecuted together must run concurrently. Section

3.03(b)(1)(A) exempts intoxication manslaughter and intoxication assault from this rule. This section allows the trial court the unbridled discretion to decide whether to run the sentences consecutive.

The conduct constituting intoxication manslaughter and intoxication assault is the only criminal conduct that is singled out for this severe penalty. This is because even though the defendant commits a single criminal act (here petitioner running a red light and causing an automobile collision while intoxicated) he can be punished with multiple consecutive sentences if there is more than one victim. This is because each victim constitutes a new and separate crime. *Ex Parte Rathmell,* 717 S.W.2d 33, 41 (Tex. Crim. App. 1986).

In petitioner's case, once he pled guilty to the three intoxication manslaughter charges, he faced a range of punishment from probation to sixty years. Petitioner's claim on appeal is that the arbitrary nature of the sentencing process that led to his sixty-year sentence violated his constitutional rights to due process under the Fourteenth Amendment to the United States Constitution.

The Texas courts did not address petitioner's contentions as they related to the intoxication manslaughter charge. They relied on the case of *Barrow v. State,* 207 S.W.3d 377 (Tex. Crim. App. 2006) to reject his due process claim without discussion or analysis. *Barrow*, while analogous in some respects, is not dispositive of petitioner's claim. *Barrow* deals with violations of Texas Penal Code §22.011, multiple sexual assaults against a single child vic-

tim. Section 3.03 (b)(2)(A) provides that if multiple acts are perpetrated during the same episode with the same victim, the court can cumulate. Barrow was convicted of two separate acts of sexual assault, involving two separate acts of sexual misconduct during the same episode with one victim (unlike petitioner's one act of criminal misconduct with multiple victims). Barrow's fifteen-year sentence and twenty-year sentence "reflected the facts found by the jury as to that individual count." *Barrow* at 379. The facts that were the basis for each of petitioner's punishments were identical, unlike Barrow's different facts. When the trial court cumulated Barrow's sentences, he was being punished again for two different criminal acts, just as a trial court might cumulate sentences from different court proceedings. When the trial court cumulated petitioner's sentences, he was being punished again for the same criminal act. This is because the jury considered his single set of criminal conduct and the deaths of all three victims in assessing each twenty-year sentence.

The United States Constitution's due process right protects from arbitrary impairment most of the rights of life, liberty and property that are regarded as fundamental. *Rochin v. California,* 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). An arbitrary act is something done without adequate determining principle, nonrational. *Black's Law Dictionary,* 134 (Revised 4th ed. 1968).

The way petitioner received his eventual punishment was without adequate determining principle and not rational for several reasons. Having two different sentencing agencies, the judge and jury,

sentence petitioner for the same conduct is inherently arbitrary. In *Barrow*, the jury assessed punishment for two different criminal acts. Petitioner's jury assessed three twenty-year sentences for each intoxication manslaughter charge. Each of these sentences reflected the jury's assessment of criminal history, his good points, his conduct and the three deaths which were the result of his conduct. [The jury was charged that they could consider all the facts and circumstances of the case in assessing a verdict in each count. Court Record, (hereafter "CR"), Vol. 2, p. 362. This allowed the jury to consider all three deaths each time they assessed a sentence. The prosecutor emphasized this in argument "when you kill somebody, you crossed the line and this person did not kill one person. He killed three. Three." Reporter's Record (hereafter "RR"), Vol. 7, p. 157.] However, the jurors were unable to factor what the judge would do as far as cumulating the sentences. It is not a rational process to have the jurors fashion individual sentences for the same conduct and result without knowing whether or not the judge could or would double or triple their sentence. Petitioner tried to alleviate this uncertainty by informing the jury that their sentences may or may not be made consecutive at the discretion of the court. This was while questioning the panel members about whether they could consider the full range of punishment. This was denied; RR, Vol. 4. pp. 7, 45, 46; even though a potential juror asked during questioning on the range of punishment if petitioner's sentence would be concurrent. RR, Vol. 4, p. 45. The Thirteenth Court's opinion affirmed the trial court.

Another arbitrary aspect of petitioner's sentencing process is the limitation on the judge's discretion in fashioning the eventual sentence. The trial court was limited to giving petitioner twenty, forty or sixty years in punishment. What if the trial court believed fifty years was the right sentence? The court would have had to opt to go down to forty or up to sixty. This is clearly arbitrary and unique in sentencing procedures. It is not like *Barrow*, where there were two different criminal acts evaluated by the jury and disparate punishments assessed because of the different facts.

Another irrational component of petitioner's sentencing is the law that prevents the jury from knowing that the judge has discretion to stack the sentences. This means that the jury can use this uncertainty as a reason for its sentence. Why let jurors possibly speculate on the cumulative possibilities of the sentence and possibly conclude a higher sentence is warranted because the law might require their sentences be concurrent? Why not allow counsel to make sure that this gap in the jurors' information will not matter to them? There is no rational reason for keeping this from the jury or not allowing voir dire on the issue.

Another way to gauge the arbitrary nature of the sentence petitioner received is to contrast it with a rational punishment statute. The legislature could make intoxication manslaughter with multiple victims a first-degree felony. The defendant would then have the right to have his sentence assessed by a single judge of jury within a full range of punishment, from five years to life. The sentencer could

then make a judgment with the full knowledge of the effect of the sentence.

Texas courts have long held that the trial court judge has absolute discretion to cumulate sentences for two or more convictions. *Smith v. State*, 575 S.W.2d 41, 41 (Tex. Crim. App. 1979); see *Barrow v. State*. However, these consecutive sentencing cases involve separate sentences for separate acts of misconduct, and after the judge or jury has made a determination based on the differing facts surrounding each act. Petitioner's final sentence of sixty years involved three cumulated sentences for the same criminal conduct. Assuming this is legally permissible, it still must be done with due process. Petitioner's claim is grounded on his sentencing process not being fair. This claim has not been dealt with on appeal. *Barrow* barred petitioner's claim on appeal because it was construed to hold that since the legislature has given the trial court the power to cumulate sentences, the only due process right a defendant has in regard to the procedure is to not have each individual sentence exceed the statutory maximum.

REASONS FOR GRANTING THE PETITION

The appeals court of Texas has decided an important federal question in a way that conflicts with relevant decisions of this court. Specifically, they summarily rejected the petitioner's claim that his sentencing resulted from an arbitrary process.

Petitioner committed a single act of misconduct (drove through a red light while intoxicated).

This conduct resulted in three deaths. A single jury heard all the evidence, including extraneous bad acts committed by the petitioner. They used this evidence to give him the maximum sentence of twenty years for each fatality. They were not allowed to know whether the sentences would be consecutive or concurrently.

The trial judge was then vested with the authority to fashion a twenty, forty or sixty-year sentence without a hearing or additional evidence. The court used its authority to set the sixty-year sentence. Petitioner's convoluted sentencing scheme, with its foundation based on jurors' ignorance (not knowing whether the individual maximum sentences could or would be cumulated) and its imprecise range (only a twenty, forty or sixty-year sentence was available to the trial judge) is clearly not rational. The arbitrary nature conflicts with the due process rights set out by this court. *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, L.Ed. 183 (1952).

The state court's rejection of the standards articulated by this Court affected the outcome of the petitioner's case and will no doubt affect cases of other similarly situated defendants. For those reasons allowance of the writ would be appropriate.

CONCLUSION

For the reasons stated above, the writ should be granted and the case set down for argument.

Respectfully submitted,

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Counsel for Petitioner

June 9, 2009

APPENDIX

NUMBER 13-07-359-CR

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

SCOTT HELGERSON, Appellant,

v.

THE STATE OF TEXAS, Appellee.

On appeal from the 347th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Yañez, Rodriguez, and Vela

Memorandum Opinion by Justice Yañez

Appellant, Scott Helgerson, pleaded guilty to three counts of intoxication manslaughter.[1] and one count of aggravated assault.[2] A jury assessed punishment at twenty years' imprisonment and a $10,000 fine on each count. The trial court ordered that the sentences in counts one through three be served consecutively, and that the sentence in the aggravated assault count be served concurrently with the other three counts.[3] By five issues, appellant challenges the trial court's decision to cumulate his sentences (issues one through four) and its refusal to allow him to discuss the consecutive sentencing statute at voir dire (issue five). We affirm.

I. Background

In December 2007, appellant, then nineteen, was intoxicated when he intentionally ran a stop sign and collided with the victims' vehicle. As a result of the accident, three family members (ten-year-old brother and sister twins and their twenty-four-year-old sister) died. Another sibling was injured in the accident.

II. Constitutional Challenges to Consecutive Sentencing Statute

By his first issue, appellant contends his Sixth Amendment right to a jury was violated by the judge cumulating his sentences. Appellant argues that based on the United States Supreme Court's decision in *Apprendi v. New Jersey*[4] and subsequent cases,[5] he is entitled to have the jury decide whether his three sentences for intoxication manslaughter should be served consecutively. By his second issue, appellant contends the Texas consecutive sentencing scheme is so "arbitrary and capricious" that it violates his right to due process under the federal and state constitutions. In his third issue, appellant contends his right to be free of double jeopardy was violated. In his fourth issue, appellant contends the consecutive sentencing statute violates his right to equal protection under the federal constitution.

The State responds that all of appellant's constitutional challenges to the consecutive sentencing statute have been rejected by Texas courts. We agree.

A. Standard of Review

When reviewing an attack on the constitutionality of a statute, the appellate court begins with a presumption that the statute is valid and the legislature has not acted unreasonably or arbitrarily. (6) This presumption remains until the party challenging the statute carries its burden to establish its unconstitutionality. (7)

1. Right to Jury Trial and Due Process

In *Barrow v. State*, the court of criminal appeals rejected several of the arguments appellant raises in the instant case.(8) The *Barrow* court held that the *Apprendi* line of cases does not "speak to a trial court's authority to cumulate sentences when that authority is provided by statute and is not based upon discrete fact-finding, but is wholly discretionary."(9) Thus, the court held that the cumulative sentencing statute "does not violate the Sixth Amendment right to a jury trial."(10) The court also rejected the argument that the statutory scheme, which permits a trial court to decide whether to cumulate sentences, violates an appellant's right to due pro-cess.(11) We overrule appellant's first two issues.

2. Double Jeopardy

In his third issue, appellant contends his right to be free of double jeopardy was violated.

The protection against double jeopardy does not apply where separate and distinct offenses occur during the same transaction.[12] In *Ex parte Rathmell*, the court of criminal appeals held that in prosecutions for involuntary manslaughter involving multiple deaths, each individual death constitutes a complete and distinct offense.[13] The court of criminal appeals has "consistently held defendants, while operating a motor vehicle and committing an unlawful act, may be convicted for each person injured and/or murdered, in violation of a single statute."[14] The double jeopardy clause, therefore, does not bar multiple convictions in situations where separate and distinct offenses occur during the same transaction.[15] We overrule appellant's third issue.

3. Equal Protection

By his fourth issue, appellant contends that the statutory scheme permitting cumulative sentencing for intoxication manslaughter and intoxication assault, in contrast to other criminal offenses, violates his right to equal protection. We disagree.

"Under the Equal Protection Clause, when a classification does not implicate a fundamental right, or place a burden on a suspect class of persons, the proper standard of review is to determine whether there is a rational basis for the different treatment, which is to say, whether the classification bears a rational relationship to a legitimate state interest."[16] The Austin Court of Appeals has rejected the claim that the exemption of intoxication manslaughter under section 3.03(b) of the penal code violates the right to equal protection.[17] We agree

with the reasoning of our sister courts in Austin and San Antonio; we hold that the statute bears a rational relationship to a legitimate state interest and does not violate the equal protection clause. (18) We overrule appellant's fourth issue.

III. Limitation of Voir Dire

By his fifth issue, appellant contends the trial court erred when it refused to permit his counsel to discuss the consecutive sentencing statute to the voir dire panel. During voir dire, in questioning the panel regarding the full range of punishment, defense counsel explained that a sentence in excess of ten years could not be probated. In response to a question, he noted that the ten years was "per count," because there were "three separate counts." A prospective juror asked, "Is that concurrent?" The State objected, and the trial court sustained the objection.

Appellant argues that the limitation on discussing the consecutive sentencing statute "impeded [his] voir dire and intelligent use of his strikes." According to appellant, the error "automatically establishes harm and is not subject to a harm analysis."

We are unpersuaded by appellant's argument. In *Barrow*, the court of criminal appeals noted:

The Legislature was not required to provide the option to cumulate sentences at all. That the Legislature did so provide, but then reserved the cumulation aspect of punishment *for the judge rather*

than the jury, does not change its essentially normative, non-fact-bound character.

. . . .

. . . The Legislature has charged the trial court with the determination of whether to cumulate and the trial court is free to make this determination so long as the individual sentences are not elevated beyond their respective statutory maximums.[19]

We also note that the Dallas Court of Appeals recently found that a trial court did not err in denying an appellant's request to instruct the jury that the trial court could cumulate his sentences.[20] The court noted that "[w]hether multiple sentences run concurrently or consecutively is a matter left to the trial court's discretion," and was thus "not a matter that the trial court was required to submit to the jury."[21] We hold that because the legislature has charged the trial court--not the jury--with the determination of whether to cumulate sentences, the trial court did not err in denying appellant's request to discuss the cumulative sentencing statute with the jury panel on voir dire. We overrule appellant's fifth issue.

IV. Conclusion

We affirm the trial court's judgment.

/S/_____

LINDA REYNA YAÑEZ,
Justice

Do not publish. Tex. R. App. P. 47.2(b).

Memorandum Opinion delivered and filed

this the 28th day of August, 2008.

1. *See* Tex. Penal Code Ann. § 49.08 (Vernon Supp. 2007).

2. *See id.* § 22.02 (Vernon Supp. 2007).

3. A fourth count, for intoxication assault, was abandoned by the State.

4. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt").

5. *See Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004).

6. *Luquis v. State*, 72 S.W.3d 355, 365 (Tex. Crim. App. 2002); *Ex parte Granviel*, 561 S.W.2d 503, 511 (Tex. Crim. App. 1978).

7. *Luquis*, 72 S.W.3d at 365; *Granviel*, 561 S.W.2d at 511; *Ex parte Ports*, 21 S.W.3d 444, 446 (Tex. App.-San Antonio 2000, pet. ref'd).

8. *See Barrow v. State*, 207 S.W.3d 377, 379-80 (Tex. Crim. App. 2006).

9. *Id.* at 379; *see Alameda v. State*, 235 S.W.3d 218, 224 (Tex. Crim. App. 2007) (noting "the *Apprendi* line of cases does not apply to a trial court's decision to cumulate jury-imposed sentences").

10. *Id.* at 380.

11. *See id.* at 382 ("We do not believe that the legislatively endowed, normative decision whether to cumulate sentences exceeds that level of discretion that the Supreme Court has always recognized as consistent with due process.").

12. *Phillips v. State*, 787 S.W.2d 391, 394 (Tex. Crim. App. 1990).

13. *Ex parte Rathmell*, 717 S.W.2d 33, 35 (Tex. Crim. App. 1986).

14. *Phillips*, 787 S.W.2d at 394.

15. *Rathmell*, 717 S.W.2d at 36.

16. *Papke v. State*, 982 S.W.2d 464, 466 (Tex. App.-Austin 1998, pet. ref'd, untimely filed) (citing *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)).

17. See id.

18. *See id.; see also Perez v. State*, Nos. 04-01-00552-CR, 04-01-00553-CR, 2003 Tex. App. LEXIS 806, at *9 (Tex. App.-San Antonio Jan. 29, 2003, pet. ref'd) (mem. op.) (following *Papke*).

19. *Barrow*, 207 S.W.3d at 381-82 (emphasis added).

20. *See Estrada v. State*, Nos. 05-06-00394-CR, 05-06-00395-CR, 2007 Tex. App. LEXIS 3892, at *9 (Tex. App.-Dallas May 18, 2007, no pet.) (not designated for publication).

21. *Id.*

MANDATE

TO THE 347TH DISTRICT COURT OF NUECES COUNTY, GREETINGS:

Before our Court of Appeals for the Thirteenth District of Texas, on the 28th day of August, 2008, the cause upon appeal to revise or reverse your judgment between

SCOTT HELGERSON, Appellant

v.

THE STATE OF TEXAS, Appellee

Cause No. 13-07-00359-CR (Tr. Ct. No. 06-CR-4557-H)

was determined; and therein our said Court made its order in these words:

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On appeal from the 347th District Court of Nueces County, Texas, from a judgment signed May 17, 2007. Memorandum Opinion by Justice Linda Reyna Yanez. Do not publish. Tex. R. App. P. 47.2(b).

THIS CAUSE was submitted to the Court on April 24, 2008, on oral argument, the record, and briefs. These having been examined and fully considered, it is the opinion of the Court that there was no error in the judgment of the court below, and said judgment is hereby AFFIRMED against appellant, Scott Helgerson.

It is further ordered that this decision be certified below for observance.

03/11/09 - Appellant's petition for discretionary review - REFUSED.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court of Appeals for the Thirteenth District of Texas, in this behalf, and in all things have it duly recognized, obeyed and executed.

WITNESS, the Hon. Rogelio Valdez, Chief Justice of our Court of Appeals, with the seal thereof affixed, at the City of Edinburg, Texas, this the 7th of May, 2009.

DORIAN E. RAMIREZ, CLERK
By: /s/Silvia Mata
Deputy Clerk